

74.1231(b) of the Commission's Rules by programming them "directly through space" at all times, which is what he reported to the Commission throughout his contacts with it.

492. Therefore, the record is clear that Mr. Turro did not misrepresent and/or lack candor to the Commission concerning the operations of the Fort Lee translator and the Pomona translator in general, and specifically, his representations to the Commission in his application for a new Intercity Microwave Relay Station (MMB9, pp. 146-153), his July 27, 1995 response to Mr. Goldstein of the Bureau (MMB8) and his testimony in this hearing did not misrepresent material facts and/or lack candor about them.

E Credibility of witnesses

1) Mr. Turro

493. Mr. Turro provided approximately two and one half days of live testimony during the hearing and personally attended all nine days of the hearing, with the exception of one half day. Throughout his appearance during the hearing, the Presiding Judge observed Mr. Turro to be direct and forthright. He provided extensive testimony on technical matters, including lengthy live demonstrations of the remote control operations between the Dumont studio and the Monticello station and the Fort Lee translator. At all times, Mr. Turro appeared to answer questions directly and candidly. He was a well informed, careful and candid witness.

494. Mr. Turro's history of communications with the Commission also demonstrate candor. His January 1991 request for a declaratory ruling was forthright and there was no evidence that he made any attempt to deceive the Commission. (PF 2) Seeking guidance in writing from the Commission demonstrates candor in and of itself.

495. The record establishes that Mr. Turro acted in reasonable reliance on the November 19, 1991 declaratory ruling from Mr. Stewart, Chief of the Mass Media Bureau, when he entered into the Network Affiliation Agreement with MMBI. (PF 4-5) In fact, the Commission stated in the HDO:

...we acknowledge that the Bureau issued Turro a letter in 1991 which he may have construed to authorize his relationship with WJUX and MMBI. [citation omitted] We agree with the Bureau that the 1991 letter was not so broad as to authorize what is now known to be the relationship between WJUX and the translators. We find Turro's contention to the contrary, however, is not unreasonable. (HDO, note 13)

496. When the Bureau informed Mr. Turro that it had rescinded its 1991 letter, and directed him to either end the arrangement with MMBI or divest his ownership in the translators (April 5, 1996 letter from Mr. Stewart) (PF 13), Mr. Turro filed an application to assign the translators to a trust. When the Bureau rejected that approach (PF 14), Mr. Turro entered into an outright sale of the translators and filed an application for authority to assign their licenses. (PF 15) Thus, when the Bureau rescinded the declaratory ruling, Mr. Turro acted reasonably in response. The Commission then decided to designate this matter for the instant hearing rather than act on that application, instead holding it in abeyance. (HDO, para. 23)

497. Mr. Turro's July 27, 1995 response to Mr. Goldstein's letter of inquiry was candid and accurate, including the sworn statement from Mr. Hurst, dated July 25, 1995, demonstrating that the Fort Lee translator could, and did, receive Jukebox Radio programming directly off the air from the Monticello station. The HDO made no mention of Mr. Hurst's July 25, 1995 statement.

498. The Bureau admitted, and Mr. Loginow agreed, that Mr. Turro cooperated fully with Mr. Loginow during his August 2, 1995 inspections and testing of the Fort Lee and the Pomona translators. (PF 120; 129)

499. In applying for a new intercity relay microwave station, Mr. Turro expressly represented that the station would transmit announcements and operational communications from the Dumont studio to the Fort Lee translator, and the Commission issued the license for WMG-499 based upon those representations. (PF 78; 238-239) When the Commission directed Mr. Turro to deactivate the WMG-499, he did so promptly. (PF 79) Mr. Turro's consulting engineers fully described the uses of WMG-499 to the Commission in their June 1995 letter. (PF 240) In connection with WMG-499, Mr. Turro acted candidly at all times.

500. Therefore, based on the entire record of this proceeding and Mr. Turro's demeanor during the hearing, the Presiding Judge finds Mr. Turro to be a well informed, reliable and candid witness.

2) Mr. Luna

501. Mr. Luna provided testimony, which if credible, would support portions of the issues designated against Mr. Turro. However, Mr. Luna's testimony may be accorded little or no weight and his credibility is lacking.

502. Mr. Luna claimed extensive knowledge of the technical operations of Jukebox Radio, including such matters as: "transmitter functions, audio carriers, remote units, and other engineering functions" and he claimed to know how to "raise and lower the power of the Monticello and the Fort Lee units" and take "transmitter readings for both units" from the Dumont studio where he was employed. (PF 285-286)

503. It is uncontested that Jukebox Radio was Mr. Luna's first paying job in radio and that he entered employment there with virtually no training or experience in the technical aspects of radio. (PF 321) He never visited the facilities of any of the Monticello station, the Fort Lee translator or the Pomona translator. (PF 298)

504. On cross-examination, Mr. Luna's testimony became suspect. Mr. Turro and Mr. Hurst both testified that it was technically impossible to "raise or lower" (*i.e.* adjust) the power of either the Monticello station or the Fort Lee translator transmitters remotely. (PF 70; 73) When confronted with that testimony, Mr. Luna attempted to explain that "raise and lower" does not mean adjust but instead "raise and lower" has the same meaning as "turn on and turn off." He further qualified that his understanding of "raise and lower" applied specially to transmitters because he admitted that for a volume control, "raise and lower" means adjust, and does not mean "turn on and turn off." (PF 303)

505. Similarly, when confronted with testimony from both Mr. Turro and Mr. Hurst that it had never been possible to take "transmitter readings" remotely for the Fort Lee translator, Mr. Luna apparently withdrew that prior testimony and qualified his earlier testimony by claiming that he could tell from the status lights on the TC-8 remote control unit for the Fort Lee translator whether the transmitter was turned on or off and he testified that this was what he had meant by taking a "meter reading." (PF 304) Mr. Luna subsequently contradicted that testimony by stating that he knew of no status light on the TC-8 unit for the Fort Lee translator which indicated whether the translator's transmitter was turned on or off. (PF 305) When cross-examined about what he thought that he had done to take remote "transmitter readings" from the Monticello station transmitter, he was unable to provide a credible response. The most he was able to say

was that he could take “transmitter readings” for the Monticello station by noting if there was a problem with the tower lights where the station’s antenna was located. (PF 307) Obviously, the condition of tower lights is irrelevant to a transmitter reading.

506. Mr. Gaghan testified that the staff in the Dumont studio never took transmitter readings. (PF 306) Mr. Gaghan and Mr. Luna were employed there at virtually the same time. (PF 40-41)

507. Mr. Luna testified that the remote control unit in the Dumont studio for the Monticello station was a different type from the one for the Fort Lee translator. (PF 299) Mr. Turro testified that the two units in question were identical models of the TC-8 remote control unit and also identical to the model of TC-8 used for live demonstrations during the hearing. (PF 62)

508. Mr. Luna’s story concerning Mr. Garland and the Monticello station being off the air while the Fort Lee translator was on the air was denied directly by Mr. Garland. (PF 316-320)

509. Mr. Luna’s story concerning the “deception,” which reputedly included both Mr. Gaghan and Mr. Owen, was denied directly by Mr. Owen. (PF 376)

510. Mr. Luna’s testimony about variations in Jukebox Radio audio quality, which he claimed to have been able to perceive, was inconsistent. He claimed that audio quality varied seasonally, worsening in the winter, as compared to the summer. (PF 291) However, Mr. Hurst testified that seasonally audio quality tends to be lower in summer months but that in his experience the reception quality of the Fort Lee translator in the summer was good to excellent. (PF 156) More specifically, Mr. Luna testified that he left Jukebox Radio early in June 1995, so

he was never even employed there during summertime; therefore he had no basis from which to make a comparison. (PF 40) Mr. Luna also testified that the only explanation for differences in audio quality of the Fort Lee translator was whether or not it was receiving programming from WMG-499. (PF 301) Such testimony contradicts Mr. Luna's own opinion that the audio quality worsened in the winter (PF 291; 302) (*i.e.* a seasonal factor irrelevant to WMG-499) and fails to take into account numerous other possible causes of audio quality variations, such as the lightning damage to the Monticello station antenna in April 1995 which Mr. Hurst and Mr. Loginow both thought could have reduced the audio quality of the Fort Lee translator. (PF 106-107) Moreover, as a man with virtually no technical training or experience, Mr. Luna's opinions about the causes of variations in audio quality are entitled to no weight.

511. In addition, Mr. Luna testified that he knew when the Fort Lee translator was retransmitting audio from WMG-499 because the Fort Lee translator audio quality was high and when the Fort Lee translator was retransmitting a signal off the air, then its audio quality was lower. (PF 291; 301) Mr. Luna's testimony is contradicted directly by Mr. Loginow's observations of high quality audio heard from the Fort Lee translator when it was proven to be retransmitting an off the air signal on August 2, 1995.⁸ (PF 119)

512. In his initial testimony, Mr. Luna contended that WMG-499 was used "routinely" to program the Fort Lee translator (PF 288) (rendering off the air reception of the Monticello station or the Pomona translator unnecessary) but he also inconsistently stated that he had thought it

⁸August would be during the summertime when Mr. Hurst has testified that seasonal variation might actually diminish the Fort Lee translator's audio quality.

“impossible” for the Fort Lee translator to be on the air if the Monticello station was off the air.

(PF 295)

513. Another basis for Mr. Luna’s claim to know that WMG-499 was used “routinely” to provide programming directly to the Fort Lee translator was that he purportedly saw that the TC-8 unit for the Fort Lee translator “was in number 1 position and light number 1 was lit.”⁹ (PF 293)

514. As concluded above, that testimony about “routine” use of WMG-499 is wrong and directly inconsistent with the testimony of Mr. Turro, Mr. Loginow and Mr. Hurst. Mr. Turro testified that light No. 1 always has indicated only that the main transmitter was operating at the Fort Lee translator. (PF 77) His testimony was consistent with the arrangement of transmitter functions in the left column of lights on the TC-8, 1-4, and receiver functions in the right column of lights, 5-8. (*Ibid.*) Similarly, Mr. Luna testified that light No. 5 showed that the Fort Lee translator was receiving either the Pomona translator or the Monticello station off the air. (PF 293) Such an arrangement, which could not distinguish between the two program sources, was contrary to Mr. Turro’s testimony (PF 77) and would have been irrationally imprecise.

515. Mr. Luna also testified that he knew that the Monticello station was off the air because a strobe light would flash in the Dumont studio. (PF 294) Mr. Turro testified that he had installed the strobe light in question personally, intending for it to flash if the 56 Kbps landline connection was lost. However, Mr. Turro discovered that the strobe light would flash if

⁹MMB14, p. 231. As described in the following section concerning Mr. Gaghan, Mr. Luna’s written testimony about the TC-8 being “in number 1 position and light number 1 was lit” is identical in terms to Mr. Gaghan’s written testimony, strongly indicating that their testimony was rehearsed.

there was trouble on the telemetry channel alone and without any problem at all with either the audio channel carrying the Jukebox Radio programming or without any loss of transmission from the Monticello station transmitter. (PF 64-65)

516. During his live demonstration in the hearing room, Mr. Turro showed that the strobe light would flash if a demonstration data channel was shorted out without interruption in the operation of a demonstration transmitter. (PF 66) Mr. Turro's demonstration and testimony, in combination with Mr. Luna's obvious lack of technical knowledge, render Mr. Luna's testimony concerning the strobe light without credibility.

517. Mr. Luna testified that he took a job with Universal in early August 1995, after leaving Jukebox Radio, and that around the time that he started working there, he wrote his August 9, 1995 statement and provided it to Universal to use against Mr. Turro. (PF 312) Mr. Luna testified that he was bitter about his experience working for Jukebox Radio. (PF 322) He was an employee of Universal throughout the hearing. (PF 40) These circumstances indicate that Mr. Luna was biased against Mr. Turro.

518. Therefore, the testimony of Mr. Luna is entitled to little or no weight because of his apparent bias against Mr. Turro, lack of technical knowledge generally, lack of personal knowledge of the Jukebox Radio operations, and numerous contradictions.

3) Mr. Gaghan

519. Mr. Gaghan also provided testimony that WMG-499 was used to provide programming directly from the Dumont studio to the Fort Lee translator. (PF 330) He testified that he could tell that WMG-499 was so used when the TC-8 unit for the Fort Lee translator "was

in number 1 position and light number 1 was lit.”¹⁰ (PF 323) Mr. Gaghan’s description of the TC-8 unit for the Fort Lee translator was identical to the description used by Mr. Luna.

(Compare PF 323 to PF 293)

520. With respect to the “number 1 position and light number 1” language, on cross-examination Mr. Gaghan amended his prior testimony, saying that the phrase “number one light” had the same meaning as “number one position.” (PF 333) He amended his previous testimony about the “number 5 position” and the “number 5 light” by subsequently testifying that those phrases had the same meaning. (PF 334) Mr. Gaghan amended his earlier testimony three different times with respect to signals from the Monticello station and the Pomona translator.

(PF 335-337)

521. Mr. Gaghan also testified that he was not well versed in the technical aspects of radio (PF 329) and, like Mr. Luna, Mr. Gaghan had never visited and viewed the facilities of any of the Monticello station, the Fort Lee translator and the Pomona translator. (PF 331)

522. Mr. Gaghan evidenced great confusion about aspects of Jukebox Radio operations, including that “a microwave” sent programming to the Monticello station and the Fort Lee translator through a “big dish” on the roof next door to the Dumont studio. (PF 330) The record established clearly that Mr. Gaghan was entirely mistaken. (PF 339)

523. It seems clear from the record that Mr. Luna and Mr. Gaghan shared between them their testimony concerning WMG-499 because their statements used identical language, several of the terms of which Mr. Gaghan later repudiated on cross-examination. It is not credible that

¹⁰ MMB15, p. 241.

two hostile witnesses, both working for the same adverse party (Universal), both lacking personal knowledge of the stations at issue and lacking technical expertise in general, would “accidentally” have significant amounts of identical written testimony. Moreover, Mr. Luna testified that he had helped Mr. Gaghan prepare his August 10, 1995 statement with respect to the drawing of a TC-8 unit on the first page of it by helping him remember some of the purported functions of the status lights. (PF 314)

524. For his part, Mr. Gaghan testified that no one asked him to write the August 10, 1995 statement, that no one assisted him with the substance of it in any way, and that he had tried to keep it a secret. Mr. Gaghan testified specifically that Mr. Warshaw had not asked him to write it, or suggested any part of it, and that Mr. Luna had had no part in producing it either. Mr. Gaghan testified that it was pure coincidence that he wrote a statement on August 10, 1995 and that Mr. Luna wrote a statement on August 9, 1995 about the same subject. (PF 349-355)

525. Mr. Warshaw testified that he had asked Mr. Gaghan to write a statement, which in fact promptly resulted in the August 10, 1995 statement, and that he had asked Mr. Gaghan to ask Mr. Luna to write a statement too, which resulted in the August 9, 1995 statement. Mr. Warshaw also testified that he had asked Mr. Gaghan to include two matters in the statement, the “two line business” and to use the “penalty of perjury” language, which were included in the statement. The record is undisputed that the two statements were typed and notarized by the same person, Mr. Warshaw’s secretary, and provided to Mr. Warshaw to be used against Mr. Turro. (PF 357-364)

526. Therefore, Mr. Gaghan’s testimony with respect to production of his August 10, 1995 statement is incredible. It would seem to be almost impossible that the two statements were

produced and provided to Mr. Warshaw at the same time coincidentally. The only reasonable explanation is that Mr. Warshaw, the employer of Mr. Luna and Mr. Gaghan, asked his two new employees for statements and got them, and that is Mr. Warshaw's testimony.

527. Mr. Gaghan's testimony is highly suspect because he did not acknowledge the involvement of Mr. Warshaw and Mr. Luna in the preparation of his August 10, 1995 statement, and such involvement clearly indicates why the substance of his testimony is so similar to the August 9, 1995 statement of Mr. Luna. The credibility of Mr. Gaghan is weakened further by his unbelievable testimony that he wrote his August 10, 1995 statement without being asked to do so, that he tried to keep it secret and that it was coincidence that the substance of it was so similar to Mr. Luna's contemporaneous August 9, 1995 statement.

528. It was also undisputed in the record that Mr. Gaghan holds great animosity towards Mr. Turro and has threatened him publicly. (PF 340-341)

529. Therefore, the testimony of Mr. Gaghan is entitled to little or no weight because of his bias against Mr. Turro, lack of technical knowledge, confusion about technical matters, lack of personal knowledge of the Jukebox Radio operations, contradictions, and because much of it appears cumulative repetition derived from Mr. Luna, sharing many of the same mistakes and confusion.

4) Mr. Luna and Mr. Gaghan's testimony about the "deception"

530. Much of the August 9, 1995 and the August 10, 1995 statements recount an alleged "deception" of an FCC inspector purportedly directed by Mr. Turro. Both Mr. Luna and Mr. Gaghan contend that Mr. Turro directed the two of them and Mr. Owen through an exercise to "deceive" an FCC inspector into believing that the Dumont studio had remote control of the

Monticello station transmitter, and that the “deception” had failed. In its entirety, the “deception” lacks any credibility for numerous reasons.

531. Mr. Owen testified that no such incident took place. (PF 376)

532. As concluded above, the formulation of the testimony of Mr. Luna and Mr. Gaghan is suspect. (C 519-527)

533. Mr. Luna and Mr. Gaghan testified differently as to when the “deception” took place. Mr. Luna testified that it took place the day Mr. Loginow visited the Monticello station (PF 297), which would have been April 13, 1995, while Mr. Gaghan testified that the “deception” took place the day after Mr. Loginow visited the Monticello station. (PF 328)

534. Mr. Turro testified that he has never attempted to deceive an FCC inspector by his own actions or by asking someone else to act deceptively and, consistent with Mr. Owen’s testimony, Mr. Turro testified that no such activity described by Mr. Luna and Mr. Gaghan ever took place. (PF 366)

535. Mr. Turro also explained that what Mr. Luna and Mr. Gaghan described could not have happened and also could not have deceived Mr. Loginow during his April 1995 investigations, for the following reasons:

Mr. Spicka was using the only telephone line at the Monticello station transmitter site when he was being directed by Mr. Loginow on April 14, 1995 to turn the transmitter off and on, so he could not have been simultaneously taking directions from Mr. Turro or from anyone other than Mr. Loginow;

If Mr. Turro was talking on the telephone with Mr. Luna, he could not be simultaneously talking to Mr. Spicka, or anyone else;

Mr. Luna and Mr. Gaghan agree that the “deception” took place in a matter of minutes, at most, and so Mr. Turro (who was 2000 miles away in Las Vegas at the time) could not have had any way of timing a deception of Mr. Loginow;

Similarly, neither Mr. Luna or Mr. Gaghan had any way of knowing Mr. Loginow’s activities at the time of the purported “deception;”

Mr. Luna testified several times that the Monticello station transmitter was shut down remotely from the Dumont studio by pushing a button when, in fact, two buttons had to be pushed;

Most important, Mr. Luna testified that the heart of the “deception” was that he turned down the volume of the Jukebox Radio program feed to simulate shut down of the Monticello station transmitter, but Mr. Loginow testified that when he directed Mr. Spicka to turn off the transmitter, he immediately heard “white noise” rebroadcast by the Fort Lee and the Pomona translators. As he testified, white noise was consistent with a transmitter shut down. Turning down the volume would have produced silence, not white noise. (PF 367-376)

536. Mr. Turro’s explanations of why the “deception” could not have had any actual effect on Mr. Loginow’s investigations, and otherwise made little sense, are unchallenged and fully consistent with all other relevant evidence, including the testimony of Mr. Loginow himself.

537. Therefore, the testimony of Mr. Luna and Mr. Gaghan concerning the purported “deception” lacks credibility, contradicts highly reliable testimony from other sources, and only demonstrates the rehearsed nature of their statements.

5) Mr. La Follette

538. Mr. La Follette's testimony deserves little weight for several reasons.

539. Although the CDE statement did not disclose it, during the hearing Mr. La Follette testified that the "testing" which was performed lasted about three hours, and his knowledge of it consisted of half that amount of time, divided into segments. (PF 182) The sweeping condemnations of Mr. Turro's operations set out in the CDE statement are unreliable due to their extremely limited factual basis.

540. Mr. Warshaw testified that he asked CDE "to prove" that WMG-499 was providing the Jukebox Radio programming directly from the Dumont studio to the Fort Lee translator. (PF 181) Although Mr. La Follette denied the substance of Mr. Warshaw's testimony (PF 180), it is credible that Mr. Warshaw in fact colored the CDE investigation in such a way because Mr. Warshaw also testified that he had personally listened to Jukebox Radio programming on 95.1 MHz from WMG-499 (PF 250) and that hearing it had prompted his hiring of CDE to look into the matter. (PF 181)

541. Mr. La Follette also asserted to the Commission in the February 10, 1995 CDE statement that the results of their investigations indicated that the Pomona translator was receiving its programming either from the Fort Lee translator (which allegedly was receiving its programming via WMG-499) or by a direct feed. (PF 8; 178) Either of those arrangements would have been illegal. The CDE statement also contended that the Pomona translator was in violation of the same Commission rules and policies as the Fort Lee translator because both of them were carrying the same programming. (PF 8) During the hearing, Mr. La Follette testified that he understood that the Pomona translator could receive a good signal off the air from the

Monticello station (PF 199), which would have been legal, that he had recommended to Mr. Warshaw that an investigation of the Monticello-to-Pomona path be undertaken, but that investigation was not conducted (PF 200), and that Mr. La Follette had it within his own ability to confirm or deny the assertions CDE made to the Commission in the February 10, 1995 statement concerning the Pomona translator, but that he did not try to confirm or deny them. (PF 201-203) Mr. La Follette also testified that he knew that the Pomona translator placed a “very good quality signal” over the Fort Lee translator and that he understood that the Monticello station placed a “perfectly good” and “reliable” signal over the Pomona translator. (PF 197-199)

542. The independence of Mr. La Follette’s testimony about WMG-499 is tainted by the mission CDE was asked to perform by Mr. Warshaw. The CDE statement’s representations to the Commission about the Pomona translator were deceptive because Mr. La Follette understood that it was certainly possible that the Pomona translator was operating legally by retransmitting the Monticello station off the air, but CDE condemned it anyway without candidly telling the Commission the actual facts, or without confirming or denying them, and without telling the Commission that CDE actually considered it possible that the Pomona translator was operating legally. Even worse, the CDE statement did not disclose to the Commission that CDE knew that the Pomona translator could receive “a perfectly good” and “reliable” signal from the Monticello station and that the Fort Lee translator could receive a “very good high quality signal” from the Pomona translator. In short, Universal and CDE provided the February 10, 1995 statement to the Commission despite knowing, and concealing knowledge of, the probable existence of a high quality and reliable transmission path from Monticello-to-Pomona-to-Fort Lee. That transmission path, which was not revealed, was entirely lawful. On cross-examination, Mr. La

Follette revealed that the CDE statement contention that the Monticello station signal was too low in strength and affected by WBAI to be retransmitted in fact was not too low in strength and the problem was solely interference from WBAI. (PF 186; C 412) In addition, it was not credible that at the hearing Mr. La Follette reaffirmed all assertions in the CDE statement, "of whatever nature," without qualification (PF 179), in the face of his own admissions noted above and after having reviewed the testimony of Mr. Hurst. Therefore, Mr. La Follette's opinion testimony deserves little weight due to substantial credibility failings.

VII ULTIMATE CONCLUSIONS

543. Based upon the foregoing, it is concluded that Mr. Turro operated the Fort Lee translator and the Pomona translator in compliance with the Commission's Rules, that he did not assume unlawful *de facto* control of the Monticello station and that he did not misrepresent and/or lack candor to the Commission concerning the operation of those translators. Therefore, the applications for the renewal of the licenses of the Fort Lee translator and the Pomona translator should be granted unconditionally for a full license term.

Respectfully submitted,

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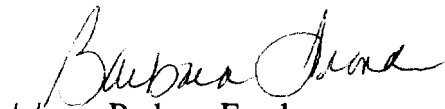
March 13, 1998

His Attorneys

CERTIFICATE OF SERVICE

I, Barbara Frank, a secretary in the law offices of Koteen & Naftalin, L.L.P., hereby certify that true copies of the foregoing "PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF GERARD A. TURRO" have been served upon the following by first-class United States mail, postage prepaid, this 13th day of March 1998:

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